IN THE COURT OF COMMON PLEAS WASHINGTON COUNTY, PENNSYLVANIA

STACEY HANEY, et al., **Plaintiffs,** **-v-** **RANGE RESOURCES – APPALACHIA, LLC, et al.,** **Defendants.**	**CIVIL DIVISION** **Docket No. 2012-3534**

BRIEF IN SUPPORT OF VACATING INJUNCTION AGAINST PUBLICATION

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Non-Parties Reid Frazier ("Mr. Frazier"), StateImpact Pennsylvania, The Allegheny Front, and 90.5 WESA (collectively, the "Enjoined Parties") respectfully submit the following Brief requesting the Court immediately vacate its May 30, 2019 order enjoining publication of information lawfully obtained by Mr. Frazier from a public file system located at and maintained by the Washington County Prothonotary. In short, both the First Amendment of the United States Constitution and Article 1, §7 of the Pennsylvania Constitution prohibit past, continuing, and future prior restraints against the Enjoined Parties.

As demonstrated below, Range Resources – Appalachia, LLC ("Range"), by immediately obtaining an *ex parte* preliminary order from this Court and now by seeking a permanent order barring publication, improperly attempts to prevent publication of true and accurate information obtained lawfully through a publicly accessible government computer. When facts are true and newsworthy, the Supreme Court has instructed that the First Amendment provides a nearly absolute right to publish that information. That is especially true where, as here, the information sought to be published constitutes ordinary information related to a case between two private civil litigants. Range's desire to keep confidential the settlement amount it paid to the Plaintiffs

in this case is insufficient to justify an extreme violation of the Enjoined Parties' rights under the First Amendment and Pennsylvania Constitution. This is not a close case. The injunction is unconstitutional.

QUESTION PRESENTED

Whether Range can meet its burden under the First Amendment and the Pennsylvania Constitution of establishing the "most exceptional circumstances" to impose a prior restraint on a news organization's speech, when the United States Supreme Court has suggested that only the publication of troop movements during time of war or the threat of nuclear holocaust may justify such extraordinary relief and has never upheld such a restraint on publication in the history or our nation? Suggested Answer: No.

RELEVANT FACTUAL BACKGROUND

As the Court and Parties are intimately familiar with the factual and procedural background in this case, the Enjoined Parties will only briefly summarize them here as they understand them. In January 2018, the Parties reached a preliminary settlement agreement and prepared a term sheet. However, they were unable to reach a final settlement. On August 31, 2018, this Court entered an order to enforce the terms of the settlement agreement, and also ordered that all filings related to that order, including the terms of the agreement, were to be placed under seal.

The Pittsburgh *Post-Gazette* newspaper petitioned to intervene in the case and sought to lift the seal. A hearing on the petition was held on May 28, 2019, before the Hon. Katherine B. Emery, President Judge, in Courtroom No. 1 of the Washington County Courthouse. Attending the hearing was Mr. Frazier, a reporter for the Allegheny Front, a public media news outlet that provides content to Pittsburgh Community Broadcasting Corporation, the operator of 90.5

WESA, a Pittsburgh NPR-affiliated radio station. The Allegheny Front and 90.5 WESA are partners in StateImpact Pennsylvania, a public media collaborative. Being unfamiliar with the details of the case, following the hearing Mr. Frazier visited the Washington County Prothonotary's office and accessed the public database, which is maintained by the Prothonotary and is available to the general public. Mr. Frazier provided the required collateral (his car keys) in order to obtain a fob to print documents from the database. One of the documents he was able to access and print was the August 31, 2018, order which contained the settlement amount and other settlement terms. Mr. Frazier printed and paid for copies of the documents he viewed, and was provided receipts for the copies by the Prothonotary staff. He then left the Washington County Courthouse.

Mr. Frazier had no reason to conceal his newsgathering efforts. Rather, he reached out to the parties for comment. On May 30, 2019, at 10:43 a.m., Mr. Frazier e-mailed Range and informed it that he intended to publish a story and asked for comment by 1:00 p.m. that day concerning the terms of the settlement between the Parties and requested comment from Range. At 11:53 a.m., Erin McDowell, an attorney for Range, responded to Mr. Frazier and informed him that she had made the Court aware of the pending publication, demanded he refrain from publishing his article, and threatened him with legal action, including seeking to hold him in contempt of court, without any expression of concerns for the constitutional implications of such a course of action. At 1:03 p.m., Kim Brown, another attorney for Range, provided Mr. Frazier with an order from this Court enjoining publication until a hearing before the Court on June 4, 2019, at 1:00 p.m.

It bears repeating that everything Mr. Frazier did while in the Prothonotary's office was in full public view using publicly available and accessible tools provided by the County. Mr.

Frazier used the public login information provided by the Prothonotary's office in order to gain access to the database. To her credit, Joy Schury Ranko, the Washington County Prothonotary, admitted publicly to the *Observer-Reporter* that Mr. Frazier was able to access documents intended to be sealed because of a "software glitch" that obscured the document from view within the court system but, "unbeknownst to us [the Prothonotary staff]," allowed the document to remain on view to those using the public terminal.[1]

ARGUMENT

I. THE INJUNCTION VIOLATES THE FIRST AMENDMENT AND THE PENNSYLVANIA CONSTITUTION.

Range received a preliminary and now seeks a permanent order barring the Enjoined Parties from publishing information already in its possession (the "Request"). On its face, the Request constitutes a classic prior restraint on publication. Such an order would violate bedrock constitutional principles and would directly conflict with binding legal precedent.

A. Prior Restraints Against the Press Are Presumptively Invalid

A prior restraint, "one of the most extraordinary remedies known to our jurisprudence," constitutes "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 562 (1976). The Supreme Court has *never* upheld a prior restraint on news reporting by the press and, to the contrary, has repeatedly recognized that the "chief purpose of the [First Amendment] guaranty [is] to prevent previous restraint upon publication." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). "Any system of prior restraints of expression comes to this [or any] Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714

[1] Barbara Miller, *Radio Reporter Obtains Copy of Confidential natural Gas Settlement, But Court Stifles Him*, OBSERVER-REPORTER, June 1, 2019. A true and correct copy of this article is attached hereto as Exhibit A.

(1971) ("*Pentagon Papers*") (internal quotations and citation omitted). Some two hundred years of unbroken precedent establish a "virtually insurmountable barrier" against the issuance of a prior restraint against the news media. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

Our system depends upon the judgment of an independent press and does not permit judges the option of regulating the content of news – even to advance important ends – any more than it tolerates legislative or executive branch control over news content. The bright line drawn around prior restraints is so fundamental that a number of Supreme Court opinions, both before and after *Near v. Minnesota*, have expressed the ban on judicial injunctions against publication as an absolute. *See, e.g.*, *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907) (the "main purpose" of the First Amendment "is to prevent all such *previous restraints* upon publications") (emphasis in original) (internal quotations and citation omitted); *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936) (the First Amendment was meant to preclude "any form of previous restraint upon printed publications, or their circulation"); *Kunz v. New York*, 340 U.S. 290, 307 (1951) (Jackson, J., dissenting) ("Decisions such as *Near v. State of Minnesota* hold any licensing or prior restraint of the press unconstitutional, and I heartily agree.").

The Pennsylvania Constitution has codified a prohibition against prior restraints that is just as strong – *if not stronger* – than that afforded by the First Amendment. *See Commonwealth v. Tate*, 495 Pa. 158, 170, 432 A.2d 1382, 1388 (1981); *William Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, 95-96, 173 A.2d 59, 61-62 (1961). The courts have recognized Article I, §7 as providing broader freedom of expression than the First Amendment, and find the provision was "designed to prohibit the imposition of prior restraints upon the communication of thoughts and

opinions." *Tate*, 495 Pa. at 170, 432 A.2d at 1388 (quoting *Goldman Theatres*, 173 A.2d at 62); *see also Willing v. Mazzocone*, 482 Pa. 377, 381, 393 A.2d 1155, 1157 (1978). As explained by the Pennsylvania Supreme Court, the special protections granted free speech rights in the Commonwealth has a more than two hundred year history,[2] and are viewed "not simply as restrictions on the powers of government, as found in the Federal Constitution, but as inherent and 'invaluable' rights of man." *Tate*, 495 Pa. at 171, 432 A.2d at 1388.

While the United States Supreme Court has acknowledged the possibility of "exceptional cases" where a prior restraint might survive constitutional scrutiny, it has established tests so difficult to meet that the prohibition is essentially absolute. It has held that prior restraints may be justified, if at all, only in the most exceptional circumstances such as "suppression of information that would set in motion a nuclear holocaust." *Pentagon Papers*, 403 U.S. at 726 (1971) (Brennan, J., concurring); *see also id.* at 726-27 ("only governmental ... proof that

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[2] The Pennsylvania Supreme Court quotes Blackstone's writings for the underpinnings of the Commonwealth's constitutional protection of free speech, and particularly the ban on prior restraints:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman had an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.

Willing, 482 Pa. at 381-82, 393 A.2d at 1157-58; *Goldman Theatres,* 405 Pa. at 88-89, 173 A.2d at 62.

publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a [troop] transport already at sea can support even the issuance of an interim restraining order" against the press). The Court "has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). In *Nebraska Press*, for example, no less than five Supreme Court Justices concluded that any prior restraint imposed to protect a criminal defendant's Sixth Amendment rights would likely be unconstitutional if it bars publication of lawfully obtained information about pending trials.[3]

Finally, the failure of the government to prevent the public from accessing confidential information is an insufficient basis to restrict the freedom of the press. As the Supreme Court has stated, "[w]here, as here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting, Oklahoma Publishing*, and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity." *Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989); *see also Ashcroft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000) (reversing contempt order against reporter who published confidential settlement after court clerk inadvertently provided reporter with sealed documents); *see generally Bartnicki v. Vopper*, 532 U.S. 514 (2001) (First Amendment protects publication of information lawfully obtained and

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[3] *See* 427 U.S. at 572, 594-95 (Brennan, J., concurring, joined by Stewart, J., and Marshall, J.) ("What respondents urge upon us . . . is the creation of a new, potentially pervasive exception [to] this settled rule of virtually blanket prohibition of prior restraints. I would decline this invitation."); *id.* at 570 (White, J., concurring) (expressing "grave doubt" that any prior restraint in this area would "ever be justifiable"); *id.* at 617 (Stevens, J., concurring) ("I agree [with Justice Brennan] that the judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain, and that it may not do so. . . . [I]f ever required to face the issues squarely, [I] may well accept [the] ultimate conclusion" of Justice Brennan's concurrence that there is "absolute protection" against such prior restraints).

on a matter of public concern). The proper remedy in such a situation is not to punish the public and the press by issuing a prior restraint order seeking to "lock the barn door after the horse is gone." *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1245 (2000).

For such an order sought by the Request to survive constitutional scrutiny, it would have to be demonstrated that publication of information possessed by the newspaper would destroy "an interest *more fundamental* than the First Amendment itself." *Procter & Gamble Co.*, 78 F.3d at 227 (emphasis added). This standard cannot possibly be met in this case, which involves a run-of-the-mill civil dispute between private litigants.

B. The Allegedly Confidential Nature of a Settlement Agreement Between Private Litigants Does Not Justify Entry of a Prior Restraint.

Presumably, Range seeks to keep the terms of the settlement between the Parties confidential to prevent negative media coverage of its actions giving rise to this case and to prevent the settlement amount from being used against it in future cases. But these concerns do not possibly overcome the heavy presumption against prior restraints.

Courts faced with a request to issue a prior restraint to prevent publication of purportedly confidential business information regularly deny those requests. For instance, in *Procter & Gamble Co. v. Bankers Trust Co.*, the Sixth Circuit overturned a lower court injunction which had prohibited publication of commercial information designated as confidential by the parties during discovery and which had been obtained by a magazine. *See* 78 F.3d 219. In reversing the permanent injunction, the Sixth Circuit stated that "the documents in question are standard litigation filings … . The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint." *Id.* at 225. Similarly, in *Rain CII Carbon, LLC v. Kurczy*, the court dissolved an injunction that had been issued by a state court preventing publication of confidential financial information of a privately

held company. *See* No. 12-2014, 2012 WL 3577534 (E.D.La. Aug. 20, 2012). There, the court stated that while "[t]here is no doubt to this Court that [plaintiff] could face economic harm ... economic harm is insufficient in itself to justify a prior restraint, especially when based on speculative predictions." *Id.* at *4. Other courts have reached similar conclusions related to sensitive commercial information. *See, e.g., CBS Inc. v. Davis,* 510 U.S. 1315 (1994) (staying a lower court order granting a preliminary injunction because the alleged misdeeds of the information gatherer and the threat of economic harm are insufficient to justify a prior restraint); *Ford Motor Co. v. Lane*, 67 F.Supp.2d 745, 750 (E.D. Mich. 1999) (despite a finding that the defendant likely violated the Uniform Trade Secrets Act, the issuance of an injunction would violate the prior restraint doctrine and First Amendment).

Simply put, the desire to protect commercially sensitive information simply does not justify the extraordinary remedy of an injunction against publication of true information by the press.[4]

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[4] Mr. Frazier is not alleged to (and did not) engage in any improper conduct in his newsgathering. Even if he had, there would be no basis for the imposition of a prior restraint. The prohibition against prior restraints is so deeply rooted in our law that courts have declined to issue them even when the subject was stolen classified information. *See Pentagon Papers* (discussing documents that were illegally acquired and leaked by some). Another example of this principle is *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990), where the plaintiff sought to bar a television news organization from broadcasting a videotape that was allegedly recorded by the defendants illegally. *Id.* at 58. When the district court enjoined the news organization from using the tape, the Sixth Circuit promptly reversed. "No matter how inappropriate the acquisition" of newsworthy information, the court emphasized, "the right to disseminate that information is what the Constitution intended to protect." *Id.* at 59. Again, in *Food Lion Inc. v. Capital Cities/ABC*, 20 Media L. Rep. (BNA) 2263, 2264, 1992 WL 456652 (M.D.N.C. Sept. 28, 1992), the court denied an injunction to restrain a television broadcast where reporters allegedly obtained information "unlawfully and by defrauding" the subject of the report. The court held that such allegations of illegal actions "are not sufficient to raise a serious issue that prior restraint could be ordered" without violating established First Amendment principles. *Id.*

II. THE REQUEST VIOLATES THE CONSTITUTION BY SEEKING AN ORDER REQUIRING THE ENJOINED DEFENDANTS TO SURRENDER PUBLIC DOCUMENTS OBTAINED IN THE COURSE OF GATHERING THE NEWS

While the typical prior restraint case involves a court order prohibiting the dissemination of information in the possession of the news media, ordering the surrender of documents within the possession of the news media, as Range originally sought to do through the Court's May 30 Order and, presumably, seeks to do here, equally violates the First Amendment.

The Supreme Court has recognized that prior restraints take many forms, and are not limited to injunctions against publication. *See, e.g.*, *Near*, 283 U.S. at 708 (courts must regard "substance and not . . . mere matters of form" when evaluating prior restraints); *Alexander v. United States*, 509 U.S. 544, 572 (1993) ("in some instances the operation and effect of a particular enforcement scheme, though not in the form of a traditional prior restraint, may . . . raise the same concerns which inform all of our prior restraint cases: the evils of state censorship and the unacceptable chilling of protected speech") (Kennedy, J., dissenting).

There can be little doubt that an injunction compelling news organizations to surrender copies of lawfully obtained materials is a prior restraint that strikes at the core of press freedom. The *Pentagon Papers* case demonstrates that courts may consider a surrender-order to be an even more extraordinary remedy than an injunction against publication. In the district court, the government initially asked for an order enjoining *The New York Times* from publishing information from the report, and for an order requiring the newspaper to surrender all copies of the report. *United States v. New York Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y.), *rev'd*, 403 U.S. 713 (1971). The district court, whose order restraining publication was later vacated by the Supreme Court, nonetheless *refused* the government's request for an order requiring the newspaper to return the records. *Id.* at 325-26.

Moreover, an order requiring surrender of the documents would violate the Enjoined Parties' rights as reporters and publishers to engage in their editorial process and decision-making independently and without interference and, separately, would run afoul of the First Amendment reporter's privilege. Editorial choices, including decisions regarding what news is relevant to a particular broadcaster, "[t]he choice of materials to go into a [broadcast] . . . and treatment of public issues," are fully protected by the First Amendment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The United States Supreme Court was clear that governmental intrusion into "this crucial process" cannot be "exercised consistent with First Amendment guarantees of a free press." *Id.* The reporter's privilege, protecting unpublished newsgathering materials, embodies the same principles and applies here as well. *See, e.g., Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. 1997). Any Order requiring the surrender of unpublished documents would be such an intrusion and ultimately unconstitutional.

III. THE MAY 30 ORDER IS VOID FOR FAILURE TO REQUIRE A BOND AND/OR FOR FAILURE OF RANGE TO POST A BOND

Not only is the Request barred by operation of the First Amendment and the Pennsylvania Constitution, the May 30 Order itself is void because the Court did not require Range to post a bond. The May 30 Order, although not titled as such and perhaps not issued pursuant to a formal motion, is the functional equivalent of a preliminary injunction. Rule 1531(b) requires that a party seeking a preliminary injunction post a bond with the Court. The Court did not require a bond, nor did Range seek to post one. The requirement to post a bond is mandatory and the failure to require or post a bond is reversible error. *See, e.g., Walter v. Stacy*, 837 A.2d 1205, 1208 (Pa. Super. Ct. 2003) (stating that the bond requirement is mandatory and vacating a preliminary injunction for failure to require a bond); *Soja v. Factoryville Sportsmen's Club*, 522 A.2d 1129 (Pa. Super. Ct. 1987) ("Before a preliminary injunction may be granted, the

plaintiff must file a bond with the prothonotary. This requirement is mandatory and an appellate court must invalidate a preliminary injunction if a bond is not filed by the plaintiff."). Therefore, the May 30 Order is void *ab initio*.

IV. THE ENJOINED PARTIES DEMAND A FINAL HEARING

The constitutional principles set forth above prevent Range from establishing *any* of the elements necessary to obtain a permanent injunction, including a clear right to relief, that more harm will be occur if the injunction is not granted than if the Request were denied, and the public interest favors the injunction, when in fact to obtain relief Range must prove *all* of the elements are in its favor. To the extent that the hearing scheduled for June 4, 2019, at 10:00 a.m. is not considered a final hearing, the Enjoined Parties hereby demand a final hearing regarding the Request within three (3) days of the date of this Brief, and demand a final order within 24 hours after the close of the hearing. *See* Pa.R.C.P. 1531(f).

CONCLUSION

As demonstrated by the cases cited herein, courts repeatedly and consistently have held that pre-publication suppression orders violate the First Amendment. The type of alleged commercial and confidentiality interests at issue here do not come close to justifying a prior restraint on true information lawfully obtained through a publicly maintained record system, and nothing raised in the Request warrants the imposition of punitive sanctions in the form of a prior restraint. Accordingly, the Enjoined Parties respectfully ask the Court to vacate the May 30 Order with prejudice and end this controversy.

Respectfully Submitted,

STRASSBURGER MCKENNA GUTNICK & GEFSKY

By: _____

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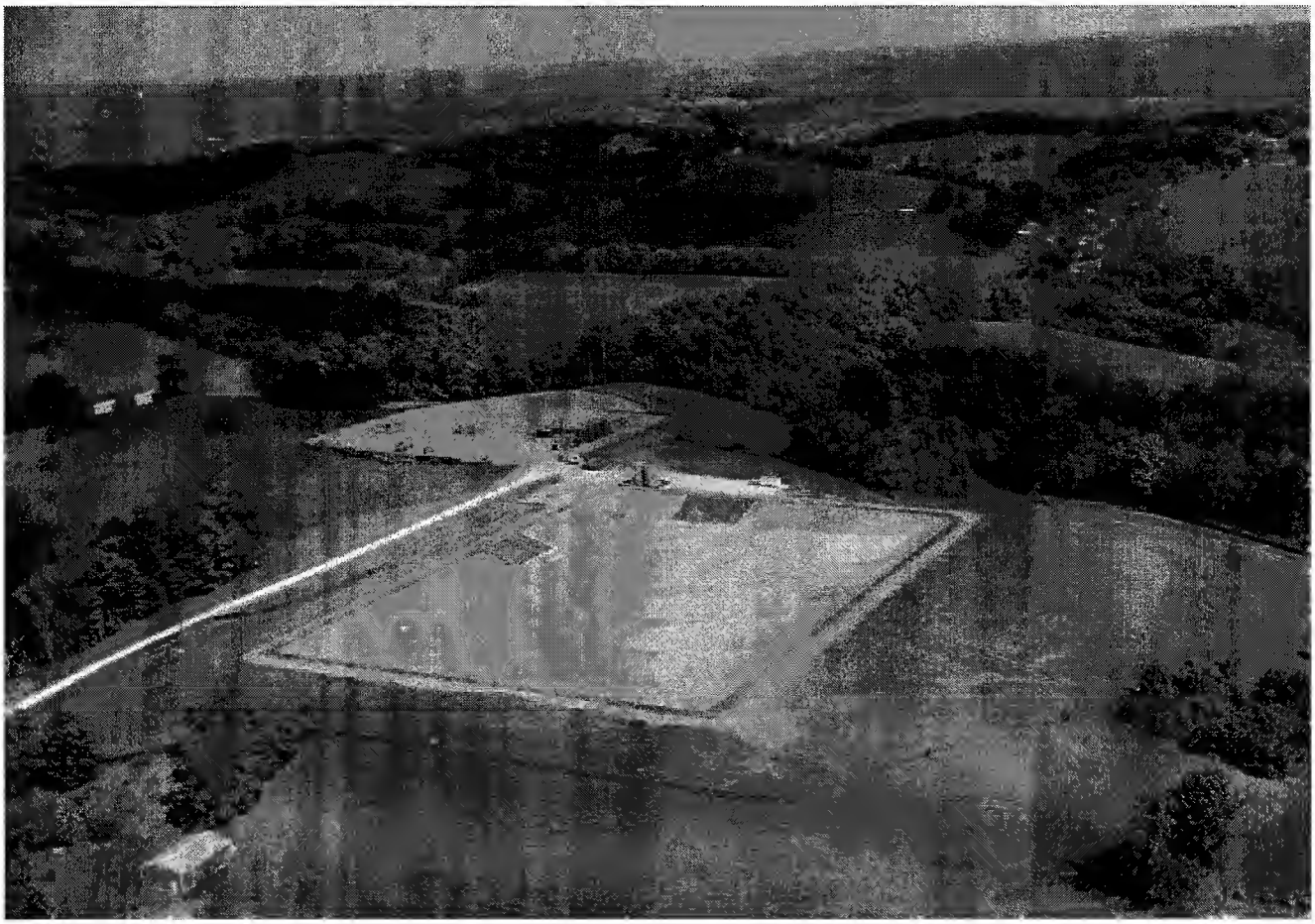
EXHIBIT A

https://observer-reporter.com/news/impoundments/radio-reporter-obtains-copy-of-confidential-natural-gas-settlement-but/article_efc76320-83d3-11e9-9193-0f9471336e69.html

EDITOR'S PICK

Radio reporter obtains copy of confidential natural gas settlement, but court stifles him

Barbara Miller Jun 1, 2019



Observer-Reporter

The Yeager centralized impoundment in Amwell Township was used in the Marcellus Shale natural gas drilling industry.

A reporter who covers the energy beat for a Pittsburgh NPR-affiliated radio station obtained a copy of a confidential settlement involving Stacey Haney, but a Washington County judge

enjoined him and others from revealing its contents.

Reid Frazier, reporter for The Allegheny Front, StateImpact Pennsylvania and WESA 90.FM, Pittsburgh, intended to reveal sealed contents from the case, but he was halted by an order from Washington County President Judge Katherine B. Emery.

According to her order, she was made aware of Frazier's pending news story Thursday morning by attorneys for Haney and Range Resources-Appalachia LLC.

Emery, who is also presiding over a case filed by attorneys for the Pittsburgh Post-Gazette, which is demanding access to the confidential settlement, scheduled a hearing on the matter involving the radio station for Tuesday.

Washington County Prothonotary Joy Schury Ranko attributed the circumstances to a software glitch that obscured the document from view within the court system but, she said, "unbeknownst to us," allowed it to remain on view to those using the OnBase system available to the public.

"You can bet it won't happen again," said Ranko, who notified both the the county's information technology department and its vendor.

Emery ordered documents in Haney's case, which alleged she and her children were harmed by chemicals leaking from Range's Yeager impoundment in Amwell Township, to be sealed on Aug. 30, 2018.

Haney's quest was the subject of a Pulitzer-Prize winning book this spring by Ellen Griswold, "Amity and Prosperity: One Family and the Fracturing of America." Other plaintiffs in the 2012 case were John and Ashley Voyles and Grace and Loren Kiskadden.

The newspaper learned earlier this year that state Attorney General Josh Shapiro had convened a grand jury to hear testimony on "several criminal investigations involving environmental crimes in Washington County."

StateImpact Pennsylvania is a collaboration among WITF Harrisburg; WHYY Philadelphia; and WESA, which broadcasts its Allegheny Front program on Pennsylvania environmental issues twice weekly.

WESA's News Director Patrick Doyle responded to an emailed request for comment with the

message, "We don't have a comment at this time."

Barbara Miller

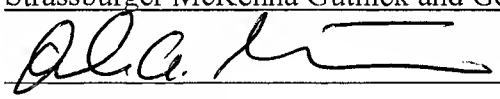
Staff Writer

Staff Writer Barbara S. Miller is a graduate of Washington & Jefferson College. She covers Washington County government, courts and general assignments.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Strassburger McKenna Gutnick and Gefsky

Signature: 

Name: David A. Strassburger, Esquire

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **BRIEF IN SUPPORT OF VACATING INJUNCTION AGAINST PUBLICATION** was served by email, this 3rd day of June, 2019, on the following:

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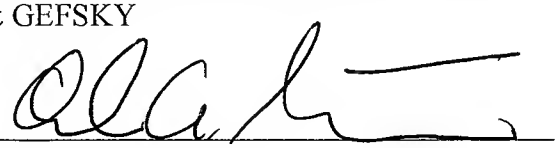

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